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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA**

In re:

Chapter 11 Proceeding

ARCTIC CATERING, INC.

Case No. 2:18-bk-13118-EPB

Debtor.

**MOTION TO APPROVE
SETTLEMENT BETWEEN DEBTOR
AND PJK FOOD SERVICE, LLC
D/B/A KEANY PRODUCE &
GOURMET**

Arctic Catering, Inc. (the “**Debtor**”) moves this Court for an order under Bankruptcy Rule¹ 9019 approving a settlement with PJK Food Service, LLC d/b/a Keaney Produce & Gourmet (“**Keaney Produce**,” and collectively with the Debtor, the “**Parties**”) relating to the *PACA Claim of PJK Food Service, LLC d/b/a Keaney Produce & Gourmet* (the “**PACA Claim**”) [DE 105]. The Debtor is contemporaneously filing a request for expedited consideration of this Motion.

In support of this Motion, the Debtor submits the following Memorandum of Points and Authorities, the documents referenced herein, and the entire record before the Court in this case.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334, and the standing order of reference signed by Chief Judge Stephen M. McNamee dated June 29, 2001, which order, among other things, refers bankruptcy cases to the bankruptcy judges for the District of Arizona.

2. This matter constitutes a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A) and (B).

3. Venue is proper under 28 U.S.C. §§ 1408 and 1409.

II. FACTUAL BACKGROUND

A. The Debtor's Business Relationship with Keaney Produce

4. The Debtor, an Alaska corporation, was founded in 1973.

5. The Debtor is a catering and support services company. Its main lines of business are logistics support, food services, and facility management for employees at remote camp and lodging centers of oil and gas companies around the country, with a primary focus on the Northwest Alaskan frontier. The Debtor also designs remote camps and related operations from the ground up.

6. Beginning several years ago and continuing post-petition, Keaney Produce began supplying, and continues to supply, the Debtor with goods and produce covered by the Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499a *et al.* (“PACA”).

7. The general course of dealing was that the Debtor would place an order with Keaney Produce to purchase produce, and Keaney Produce would generate an invoice and send the shipment to the Debtor.

B. The Debtor Files for Bankruptcy and Keaney Produce Asserts Its PACA Claim

¹ As used herein, “**Bankruptcy Rule**” refers to a rule of the Federal Rules of Bankruptcy Procedure, Bankruptcy Rules 1001-9037.

1 8. On October 25, 2018 (the “**Petition Date**”), the Debtor voluntarily
2 petitioned the United States Bankruptcy Court for the District of Arizona for bankruptcy
3 relief under Chapter 11 of the Bankruptcy Code, commencing case 2:18-bk-18-13118.

4 9. The Debtor has continued in possession of its property and is operating and
5 managing its business as debtor-in-possession pursuant to Sections 1107(a) and 1108 of
6 the Bankruptcy Code.

7 10. On October 28, 2018, the Debtor filed its *Emergency Motion for Interim and*
8 *Final Orders Authorizing Use of Cash Collateral, Granting Replacement Liens, and*
9 *Setting Further Hearings on Use of Cash Collateral* (the “**Cash Collateral Motion**”) [DE
10] requesting the interim use of cash collateral during this case, in exchange for, among
11 other things, granting Liquid Capital Exchange, LLC (“LCX”) a replacement lien on post-
12 petition accounts receivable.

13 11. After the Debtor and LCX reached an interim agreement on cash collateral at
14 the initial hearing on the Cash Collateral Motion on October 29, 2018, the Court entered
15 the *Interim Order Granting Emergency Use of Cash Collateral, Granting Replacement*
16 *Liens, and Setting Further Hearing on Use of Cash Collateral* [DE 27] through November
17 14, 2018.

18 12. A couple weeks later and after another cash collateral hearing, with an
19 agreement still in place between the Debtor and LCX, on November 15, 2018, the Court
20 entered its *Second Interim Order Granting Emergency Use of Cash Collateral, Granting*
21 *Replacement Liens, and Setting Further Hearing on Use of Cash Collateral* (the “**Second**
22 **Cash Collateral Motion**”) [DE 49] through November 28, 2018.

23 13. On November 28, 2018, the Debtor and LCX stipulated to a *Third Interim*
24 *Order Granting Emergency Use of Cash Collateral, Granting Replacement Liens, and*
25 *Setting Further Hearing on Use of Cash Collateral* (the “**Third Cash Collateral**
26 **Motion**”) [DE 65], and the Court held a third hearing on cash collateral.

27 14. As of the date of this Motion, the Court has not granted the Third Cash
28 Collateral Motion.

15. On November 30, 2018, the Debtor filed its *Emergency Motion to Approve Post-Petition Factoring Agreement Pursuant to 11 U.S.C. § 363 and 11 U.S.C. § 364* (the “**DIP Motion**”) [DE 72].

16. The Court held a hearing on the DIP Motion on December 11, 2018.

17. The Court granted the DIP Motion, in part and with modifications, with the requirement that the Debtor set aside a reserve of funds of \$160,000 to protect PACA claimants (the “**PACA Reserve**”) and a reservation of rights for PACA claimants, and entered the *Interim Order Granting Emergency Motion for Order Approving Post-Petition Factoring Agreement Pursuant to 11 U.S.C. § 363 and 11 U.S.C. § 364* [DE 99] on December 20, 2018.

18. The Court also entered the *Order Setting Notice of: Bar Date for Filing Trust Claims Under the Perishable Agricultural and Commodities Act and the Packers and Stockyards Act* [DE 95], which order set January 4, 2019, as the last day for parties to file PACA trust claims (the “**PACA Bar Date**”).

19. Keaney Produce timely filed its PACA Claim on January 3, 2019 [DE 105].

20. The Court held a final hearing on the DIP Motion on January 10, 2019 [DE 108]. At the hearing, the Court reduced the PACA Reserve to \$125,000 because only two parties filed PACA trust claims before the PACA Bar Date (including Keaney Produce), and approved the DIP Motion on a final basis. The Court also set the deadline for the Debtor to object to PACA trust claims for January 18, 2019 (the “**PACA Objection Deadline**”).

III. Agreement Between the Parties

21. Effective upon entry of an order approving this Motion, the Parties stipulate and agree (the “**Agreement**”) to resolve the PACA Claim and the Debtor’s asserted defenses thereto pursuant to the following terms:

- i. Keaney Produce shall be allowed its PACA Claim in the amount of \$10,626.72 (the “**Allowed PACA Claim**”). The PACA Claim is undisputed, non-contingent, and liquidated.

- ii. The Debtor shall make the first settlement payment on account of the Allowed PACA Claim in the amount of \$3,542.24 to Keaney Produce (the “**First Settlement Payment**”) by wire pursuant to the wire transfer instructions contemporaneously provided by Keaney Produce to the Debtor. The First Settlement Payment shall be made by or before ten days after the Bankruptcy Court enters an order granting this Motion.
- iii. Beginning 30 days after the date the Debtor makes the First Settlement Payment, the Debtor shall make payments in the amount of \$3,542.24 every 30 days thereafter for a total of two payments to Keaney Produce using the same payment method used to make the First Settlement Payment (the “**Two Settlement Payments**”). After Keaney Produce receives the First Settlement Payment and the subsequent Two Settlement Payments, the Debtor will have paid down the entire Allowed PACA Claim in full satisfaction of Keaney Produce’s Allowed PACA Claim.
- iv. Keaney Produce agrees that any remaining PACA Reserve at the time the Court enters an order granting this Motion can be released to the Debtor following receipt of the First Settlement Payment.
- v. Nothing herein, including the installment nature of the payments agreed to herein, shall be deemed, interpreted or otherwise construed as an extension of credit by the Keaney Produce to Debtor, or as a waiver of Keaney Produce’s rights under the statutory trust provision of the PACA. Keaney Produce’s rights hereunder are in addition to its rights under the PACA trust provision and Keaney Produce reserves all rights arising under the PACA trust.
- vi. This Agreement constitutes the entire understanding between the

1 negotiations, prior discussions, and prior agreements and
2 understandings relating to such subject matter.

3 vii. This Agreement is entered into between the Parties as a compromise
4 of claims disputed and is executed solely for the purpose of avoiding
5 the cost, burden, and uncertainty of litigation. None of the Parties, by
6 entering into this Agreement, admits lack of merit to their respective
7 positions or merit of opposing positions.

8 viii. The Parties acknowledge that they have entered into this Agreement
9 in reliance on their own independent investigations and analysis of
10 the facts and law governing the PACA Claim, and that no
11 representations, warranties, or promises of any kind have been made,
12 directly or indirectly, to induce any of them to enter into this
13 Agreement, other than those expressly stated herein.

14 ix. The Parties acknowledge that each has had the opportunity to review
15 the Agreement and confer with counsel, and fully understand and
16 voluntarily accept the terms of the Agreement.

17 x. If any term, covenant, condition, or provision of the Agreement is
18 illegal or invalid or unenforceable for any reason whatsoever, such
19 illegality or invalidity or unenforceability shall not affect the legality,
20 validity, or enforceability of the remaining parts of the Agreement.

21 xi. The signatories hereto represent and warrant that they have the
22 authority to execute this Agreement for and on behalf of the Parties,
23 that they have not assigned, conveyed, or otherwise transferred those
24 claims or causes of action released herein, and that the Parties own all
25 claims and defenses they purport to release herein.

26 xii. This Agreement does not modify, invalidate, or supersede the existing
27 contract between the Parties, unless otherwise stated herein.

xiii. This Court shall retain jurisdiction in the event of dispute concerning the Agreement.

xiv. This Agreement is expressly contingent upon entry of a Court order approving the terms set forth herein.

IV. Relief Requested

By this Motion, the Parties request that the Court enter an order under Bankruptcy Rule 9019 approving the settlement reached herein resolving the PACA Claim.

V. Legal Basis for Relief Requested

“On motion by the [debtor] and after notice and a hearing, the court may approve a compromise or settlement.” FED. R. BANKR. P. 9019(a). “The bankruptcy court has great latitude in approving compromise agreements” that are fair and equitable. *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988). “The law favors compromise and not litigation for its own sake[.]” *In re A & C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1986).

The Court of Appeals for the Ninth Circuit has identified the following factors for consideration in determining whether a proposed settlement is fair and equitable: “(a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and (d) the paramount interests of the creditors and a proper deference to their reasonable views in the premises.” *In re Woodson*, 839 F.2d at 620 (citations omitted).

A settlement need not serve, or even touch upon, each of the aforementioned factors in order to be approved, “provided that the factors as a whole favor approving the settlement.” *In re Pacific Gas & Electric Co.*, 304 B.R. 395, 417 (N.D. Cal. 2004). The responsibility of the bankruptcy judge is to canvass the issues to determine whether the settlement falls below the lowest point in the range of reasonableness, not to decide the numerous questions of law and fact that may be raised regarding the settlement. *Id.* (quoting *In re Drexel Burnham Lambert Grp., Inc.*, 134 B.R. 493, 496-97 (Bankr. S.D.

1 objections do not rule. It is well established that compromises are favored in bankruptcy.”
2 *In re Lee Way Holding, Co.*, 120 B.R. 881, 891 (Bankr. S.D. Ohio 1990).

3 The Agreement is fair, equitable, and beneficial to the Debtor’s bankruptcy estate
4 and its creditors and should be approved by the Court. The Agreement has been reached
5 by mutual consent of the Debtor and Keaney Produce, and will resolve the PACA Claim,
6 thereby avoiding the need for costly, burdensome, and unpredictable claims litigation. The
7 settlement also will not have any significant adverse impact on the Debtor’s bankruptcy
8 estate or its other creditors. If anything, the Agreement immediately benefits the estate
9 because it will allow the Debtor to put to use the remaining funds in the PACA Reserve
10 after Keaney Produce receives its initial \$3,000.00 First Settlement Payment. The Debtor
11 believes the Agreement is in the best interests of the estate.

12 WHEREFORE, the Debtor respectfully requests that this Court, on an expedited
13 basis: (1) enter an order approving the Motion, and (2) grant the Debtor such other and
14 further relief as is just and proper.

15 RESPECTFULLY SUBMITTED February 5th, 2019.

16 **MAY, POTENZA, BARAN & GILLESPIE,
17 P.C.**

18 By s/ Grant L. Cartwright
19 Grant L. Cartwright
20 Andrew A. Harnisch
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21

22 **Approved as to Form and Content:**

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15 Master Mailing Matrix

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